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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JACQUE D. WATTS,

Defendant and Appellant.

A130822

(Contra Costa County
Super. Ct. No. 51006857)

I. INTRODUCTION

Defendant and appellant, Jacque D. Watts, and a codefendant, Sean Allen Stamps, were convicted of first degree residential burglary, which they committed while other persons, not accomplices, were present in the residence. The trial court found the prior conviction allegations as to Watts to be true, and sentenced him to six years in prison. On appeal, Watts, who is African-American, argues that the trial court erred in denying his motion under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) with regard to the People's use of peremptory challenges against two African-American jurors.

We reject this argument and affirm the judgment.

II. THE BATSON/WHEELER CLAIM

A. Factual Background¹

During jury selection, the prosecutor exercised peremptory challenges to excuse two African-American prospective jurors, K.D. and B.R.

K.D., prospective juror No. 41, is an African-American man who stated on his questionnaire that he was single and had no children. During voir dire, he stated that he was a certified nurse's aide employed in a nursing home, and had served in the Marine Corps for eight years. The prosecutor questioned K.D. along with another panelist (referred to in the voir dire transcript as Juror No. 5), a registered nurse. The prosecutor asked K.D. and Juror No. 5 whether they were subject to mandatory reporting provisions in their professions, and whether they had ever had to make a report under those provisions. Both K.D. and Juror No. 5 responded that they were subject to mandatory reporting provisions and had previously carried out their reporting duties.

B.R., prospective juror No. 3, is an African-American woman who worked as a laboratory assistant, was married and had one adult child.

The defense challenged the prosecutor's use of peremptory challenges to excuse K.D. and B.R. The trial court stated that it found "a prima facie case based essentially on the numbers," and asked the prosecutor to explain her reasons for the peremptory challenges.²

The prosecutor did so as follows: "As to [B.R.], I have already expressed my concern yesterday, I don't think it went onto the record. I can't say that it's inattention by Ms. [R.], but Ms. [R.] clearly yesterday to the point where her elbow slipped off of the

¹ In light of the issue presented on appeal, we will not recite the evidence pertinent to the charged offense.

² The trial court noted that Watts and Stamps are African-American; one African-American man was on the jury; and there were "at least several additional African-American potential jurors." The prosecutor stated that one of the victims of the burglary, Melinda McDonald, was of African-American descent, and that another victim, Douglas McDonald (Melinda McDonald's son), appeared to be "of mixed race, African-American and Caucasian."

table was completely asleep. And the nearest juror seated next to her reacted to her waking up in that particular regard. [¶] I don't believe that any juror, it doesn't serve the defense or the People to have a juror who is sleeping through any of the proceedings. I do not have a good faith basis for believing she would remain attentive and awake during the actual trial of the case."

As to K.D., the prosecutor stated: "For Mr. [D.], I know that he is a single male adult. It doesn't appear that he has ever been married. He has no children. [¶] A review and a cumulative review of who is currently on the jury and the peremptory challenges the People have exercised will indicate that I have kicked additional people who are single and have no children, or who do not appear to have been married at any point in their time. [¶] More importantly, Mr. [D.] indicat[ed] he is a caregiver, which I think quite clearly is a type of profession which is more liberal, and to check that particular presumption, I asked Mr. [D.] whether or not he was a mandatory reporter. [¶] When I asked him if he was a mandatory reporter, he did indicate that he was, however, he has never exercised that discretion which led to support my conclusion that perhaps he is not law enforcement friendly as the prosecution would want in this particular case."

Watts's counsel argued that the prosecutor's reason for dismissing B.R. (i.e., that, according to the prosecutor, B.R. had fallen asleep) was inadequate, in light of B.R.'s appropriate responses during voir dire that she could be fair and unbiased. Stamps's counsel also contended this reason was insufficient. B.R. was in the first panel of potential jurors, and apparently fell asleep while the trial court spoke to the second panel. (When the trial court was preparing to bring in the second group of potential jurors, it asked those in the first group to bear with the court while it went through the general principles and information that the first group had already heard.) Stamps's counsel argued that other members of the first panel were not paying attention during that period and several had been reading books, and that it was not appropriate to make a distinction between them and B.R. Defense counsel did not make any arguments about the prosecutor's reasons for excusing K.D.

The trial court denied the *Batson/Wheeler* motion, stating that it found the prosecutor's articulated reasons for dismissing K.D. and B.R. to be both race neutral and "sincere in the sense they are not excuses or sham reasons made up to cover up a true bias." As to B.R., the court noted that B.R. had remained on the jury "for a fairly long period of time without having been stricken in the first 11 challenges by the People." In addition, the prosecutor had mentioned to the trial court and defense counsel the previous day (off the record) that the prosecutor had observed B.R. sleeping. Neither the court nor defense counsel had noticed B.R. sleeping. The trial court, however, found the prosecutor's account credible. The court stated: "I do [accept] that [the prosecutor] did see that yesterday. And I do find her statement to be credible and that that is her real reason."

The court also stated that there was "a distinction between a juror who falls asleep and a juror who reads a book, accepting that when I told the jurors that we would be repeating [to the second panel of jurors] everything we had said, the veteran jurors understandably wouldn't be paying direct attention throughout the duration of my speech. . . . I do think there is a distinction between one who is falling asleep which suggests that they won't hear anything that is being said, and that could be a problem during trial and one who is reading a book and can keep half an ear on the proceedings in the event, for example, we were to call their name or something. [¶] So I do think it's a valid distinction when [the prosecutor] observes a juror falling asleep, I think that is a valid concern by the People, who have the burden of proving the case beyond a reasonable doubt and a juror who is falling asleep even during jury selection may not hear all of the evidence."

As to K.D., the court also found the prosecutor's articulated reasons to be race neutral and sincere. The court stated: "[I]t doesn't mean that I would necessarily agree with the presumption that a caregiver may be less sympathetic to the People, and I think the People are entitled to make that judgment based on one's profession. [¶] And, also, the lack of marriage and kids, I understand is a factor the People consider and one's life experiences and their ability to make difficult decisions."

B. Legal Principles

“Both the federal and state Constitutions prohibit any advocate’s use of peremptory challenges to exclude prospective jurors based on race. . . . [¶] The *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.” (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613, fn. omitted (*Lenix*).

Here, the trial court found that Watts had made a prima facie showing, so the burden shifted to the prosecutor to explain her conduct.³ “A prosecutor asked to explain his [or her] conduct must provide a ‘clear and reasonably specific’ explanation of [her] ‘legitimate reasons’ for exercising the challenges.’ [Citation.] ‘The justification need not support a challenge for *cause*, and even a “trivial” reason, if genuine and neutral, will suffice.’ [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection. [Citation.] Certainly a challenge based on racial prejudice would not be supported by a legitimate reason.” (*Lenix, supra*, 44 Cal.4th at p. 613.)

The prosecutor here gave specific, race-neutral explanations of the two peremptory challenges at issue. “At the third stage of the *Wheeler/Batson* inquiry, ‘the

³ Because the trial court requested the prosecutor’s reasons for the peremptory challenges, and ruled on the ultimate question of intentional discrimination, the issue of whether Watts made a prima facie showing is moot. (*People v. Elliott* (2012) 53 Cal.4th 535, 560-561, 565, 568-569 (*Elliott*), citing *Hernandez v. New York* (1991) 500 U.S. 352, 359; *Lenix, supra*, 44 Cal.4th at p. 613, fn. 8.) We thus do not address the Attorney General’s argument that Watts failed to establish a prima facie case of discrimination.

issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.' [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her." (*Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted.)

The trial court denied Watts's motion, explicitly finding the reasons offered by the prosecutor to be sincere and race neutral. "Review of a trial court's denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] 'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges " 'with great restraint.' " [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]' " (*Lenix, supra*, 44 Cal.4th at pp. 613-614.)

C. Analysis

Watts argues that the prosecutor's stated reasons for excusing K.D. and B.R. were pretextual and intended to conceal racial discrimination, and that the trial court failed to make a sincere and reasoned attempt to evaluate those stated reasons. We disagree, and we conclude that substantial evidence supports the trial court's determination that the prosecutor's stated reasons were sincere and race neutral.

1. Panelist K.D.

As noted, the prosecutor gave two reasons for excusing K.D.: (1) he was single and had no children; and (2) the prosecutor believed that, because of K.D.'s occupation as a caregiver, he was likely to be liberal. As to the second reason (which the prosecutor

described as the more important of the two), the prosecutor stated that she had checked her presumption by asking K.D. whether he had reported under the mandatory reporting provisions. The prosecutor stated that, because K.D. had not reported, she concluded that he might not be sympathetic to law enforcement.

Watts notes that the prosecutor’s statement that K.D. had never reported anyone under the mandatory reporting statutes is not supported by the voir dire record. During voir dire, K.D. stated that he had reported.⁴ Watts argues that this misstatement suggests that the prosecutor’s actual motive was discriminatory. In the circumstances of this case, we disagree.

Our Supreme Court has explained that “factual mistakes of this sort are usually the result of faulty memory and ‘are not necessarily associated with impermissible reliance on presumed group bias.’” (*Elliott, supra*, 53 Cal.4th at p. 565; accord, *People v. Jones* (2011) 51 Cal.4th 346, 366 (*Jones*); *People v. Williams* (1997) 16 Cal.4th 153, 189 (*Williams*).)⁵ Moreover, the prosecutor made her factual misstatement in the context of stating race-neutral reasons that *were* supported by the record, i.e., K.D.’s status as a single adult with no children, and his occupation as a caregiver. (See *Elliott, supra*, 53 Cal.4th at p. 565 [prosecutor inaccurately stated that challenged juror was seated next to another specified juror, and trial court inaccurately stated that it had participated in voir dire of challenged juror, but both accurately stated that challenged juror had changed

⁴ The prosecutor asked Juror No. 5 and K.D.: “Have either of you ever had to exercise that decision and contact and reported in your position?” Juror No. 5 stated: “Actually, I have been fairly routinely when I worked with the adult population, adult protective services.” The prosecutor then asked: “Okay. And Mr. [D.], how about you?” K.D. responded: “I have.”

⁵ As Watts notes in his reply brief, the cited decisions were death penalty cases, apparently involving extensive voir dire. (See *Jones, supra*, 51 Cal.4th at p. 366.) But we reject Watts’s suggestion that the rationale of these cases—that factual mistakes in recounting voir dire are often the result of faulty memory and are not necessarily associated with group bias (see *Elliott, supra*, 53 Cal.4th at p. 565)—is limited to that context. We note that, here, the jury selection process apparently involved at least 98 prospective jurors, and occurred over several days.

position on death penalty]; *Jones, supra*, 51 Cal.4th at p. 366 [prosecutor’s statement that juror’s son had been charged with attempted murder or murder was not supported by record, but “an accurate statement (that [the juror] wrote that his son had been accused of, and tried for, a crime but left the rest of the answer blank) would also have provided a race-neutral reason for the challenge”].)

The prosecutor’s stated views about K.D.’s occupation as a caregiver would alone have provided a legitimate race-neutral explanation for the challenge. (See *People v. Reynoso* (2003) 31 Cal.4th 903, 924-925 (*Reynoso*) [prosecutor may legitimately exercise peremptory challenge against potential juror “whose occupation, in the prosecutor’s subjective estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected”].) This fact weighs against an inference that the prosecutor’s misstatement about K.D.’s response to the reporting question was an effort to conjure a race-neutral explanation and to conceal racial bias. (See *Jones, supra*, 51 Cal.4th at p. 366.)

People v. Silva (2001) 25 Cal.4th 345 (*Silva*), on which Watts relies, is distinguishable. In *Silva*, the prosecutor explained his peremptory challenge of a Hispanic juror by asserting generally that the juror would be reluctant to return a death verdict and was “ ‘an extremely aggressive person,’ ” assertions that had no support in the voir dire transcript.⁶ (*Id.* at p. 385.) The Supreme Court concluded that the trial court, which had failed to probe the issue, had not met its obligation to make a sincere and reasoned attempt to evaluate the prosecutor’s stated reasons for the challenge. (*Id.* at pp. 385-386.)

In contrast to the unsupported reasons stated in *Silva*, the prosecutor here made a factual misstatement in the context of stating legitimate race-neutral reasons that were

⁶ In *Silva*, the prosecutor, after expressing the view that a hung jury in the defendant’s first penalty trial was attributable to the racial or ethnic bias of Hispanic jurors, exercised peremptory challenges to exclude every Hispanic from the jury at the retrial of the penalty phase. (*Silva, supra*, 25 Cal.4th at p. 376.)

supported by the record.⁷ (See *Elliott, supra*, 53 Cal.4th at p. 565; *Jones, supra*, 51 Cal.4th at p. 366.) Moreover, the trial court considered and discussed those reasons on the record, finding them to be sincere and valid. The court stated that, although it did not necessarily agree that caregivers would be less sympathetic to the People, the People were entitled to make such judgments based on a juror's profession. The court also found that the fact that a juror is single and has no children is a legitimate factor for the People to consider, as it relates to "one's life experiences and their ability to make difficult decisions."

Although the trial court did not mention the prosecutor's statement about K.D.'s response to the reporting question, the court's failure to notice or correct this error does not establish that the court did not make a sincere and reasoned attempt to evaluate the prosecutor's explanation. (See *Elliott, supra*, 53 Cal.4th at p. 565 [no *Batson* error although trial court apparently did not correct prosecutor's misstatement, and trial court itself made statement that was not supported by voir dire record].)

Watts next contends that the prosecutor treated K.D. differently from a similarly situated juror who was not African-American. Juror No. 5, whom the prosecutor questioned with K.D., was also a caregiver (a registered nurse). One factor in evaluating a prosecutor's race-neutral explanation is whether "a prosecutor's proffered reason for striking a . . . panelist [who is a member of a protected group] applies just as well to an otherwise-similar [non-member of a protected group] who is permitted to serve. . . ."

⁷ The Ninth Circuit cases cited by Watts are also distinguishable; the reviewing courts in those cases found strong indications that the prosecutors' stated reasons were pretextual. (See *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1221-1224 [several of prosecutor's stated reasons for challenging two African-American jurors were not supported by the record; even after defense counsel apprised the trial court of one of the errors, the trial judge refused to "second guess" the prosecutor's reasons, thus "abdicate[ing] its duty" to determine the issue of discrimination]; *Johnson v. Vasquez* (9th Cir. 1993) 3 F.3d 1327, 1329-1331 [prosecutor challenged sole African-American potential juror; all four of prosecutor's stated reasons were unsupported by record]; see also *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698 [prosecutor stated challenge was based on juror's age and appearance, but nothing in record indicated juror's age].)

Such “evidence tend[s] to prove purposeful discrimination to be considered at *Batson*’s third step.” (*Miller-El v. Dretke* (2005) 545 U.S. 231, 241 (*Miller-El II*)). “ ‘Proof that the defendant’s explanation is unworthy of credence’ ” is, as the *Miller-El II* court observed, “ ‘simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive.’ ” (*Ibid.*) Accordingly, courts must consider comparative juror analysis “when reviewing claims of error at *Wheeler/Batson*’s third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons.” (*Lenix, supra*, 44 Cal.4th at p. 607.)

However, we are also mindful of the “potentially misleading nature of a retrospective comparative juror analysis performed on a cold record . . .” (*Lenix, supra*, 44 Cal.4th at p. 621) and that “comparative juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination.” (*Id.* at p. 622.) In conducting this type of analysis, “such evidence will be considered in view of the deference accorded the trial court’s ultimate finding of no discriminatory intent. [Citation.]” (*Id.* at p. 624.) In addition, “the question of purposeful discrimination continues to involve an examination of *all* relevant circumstances. Comparative juror analysis was only one part of the [United States] Supreme Court’s exhaustive review in an egregious case. The court did not rule that comparative juror analysis, standing alone, would be sufficient to overturn a trial court’s factual finding. Instead the court emphasized: ‘The case for discrimination goes beyond these [juror] comparisons to include broader patterns of practice during the jury selection.’ (*Miller-El II, supra*, 545 U.S. at p. 253.)” (*Lenix, supra*, 44 Cal.4th at p. 626.) “As a reviewing court, we presume the advocate uses peremptory challenges in a constitutional manner, and defer to the trial court’s ability ‘to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.’ (*Wheeler, supra*, 22 Cal.3d at p. 282.)” (*Lenix, supra*, 44 Cal.4th at p. 626.)

Therefore, “[u]nder our deferential standard, we consider whether substantial evidence supports the trial court’s conclusions. [Citation.] Evidence is substantial if it is

reasonable, credible and of solid value. [Citations.] Comparative juror analysis is a form of circumstantial evidence. [Citation.] The law has long recognized that particular care must be taken when relying on circumstantial evidence. For example, jurors in criminal cases are instructed that before they can rely on circumstantial evidence to find a defendant guilty, they ‘must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.’ [Citation.]” (*Lenix, supra*, 44 Cal.4th at p. 627.) “This same principle of appellate restraint applies in reviewing the circumstantial evidence supporting the trial court’s factual findings in a *Wheeler/Batson* holding.” (*Lenix, supra*, 44 Cal.4th at p. 628.)

Applying these standards, Watts’s argument based on comparative juror analysis is unpersuasive. As both parties note, it is not clear which juror questionnaire was completed by the juror identified in the voir dire transcript as Juror No. 5, making a full comparison with K.D. difficult. (See *Lenix, supra*, 44 Cal.4th at p. 607 [comparative juror analysis is required only when “the record is adequate to permit the comparisons”].) It appears from the record that this juror was initially identified as Juror No. 40 in the first panel of 60 jurors, while K.D. was Juror No. 41; the prosecutor questioned them together. After being sworn to serve on the jury, Juror No. 40 (on the panel) apparently was designated as Juror No. 5 (on the jury), and this title appears to have been parenthetically inserted in the voir dire transcript in place of the juror’s name. The questionnaires of the sworn jurors have been redacted to remove names and occupations, and the copies in the record do not show the jurors’ assigned numbers.⁸ The fifth questionnaire in that set may

⁸ The record also includes the questionnaires of the unsworn jurors. The parties identify two jurors in that group who listed their occupation as registered nurse (Juror No. 7 and Juror No. 13), and suggest that Juror No. 5 may be one of those two jurors. We disagree. As noted above, it appears that the juror in question was Juror No. 40 in the pool, was sworn to serve on the jury, and was then designated as Juror No. 5.

be that of Juror No. 5, as it includes answers that are consistent with those given by Juror No. 5 in voir dire, including answers to questions about whether the juror had served in the military, had relatives who had worked in the legal profession, and had family members who had been the victims of crimes.

Based on the existing record, we cannot conclude that K.D. and Juror No. 5 were similarly situated or that the prosecutor's decision to challenge K.D. (but not Juror No. 5) was based on race. As noted above, K.D. apparently was single and had no children, a factor the prosecutor expressly stated was part of her reason for challenging him. The questionnaire that may belong to Juror No. 5 (the fifth in the set of questionnaires for sworn jurors) reflects that the juror was married and had two adult children. Even if a different questionnaire in the set of sworn jurors belonged to Juror No. 5, the questionnaires reflect that each of the sworn jurors and alternates either was married, had children, or both.⁹

Finally, Watts suggests briefly that the prosecutor's first stated reason for challenging K.D. (i.e., that K.D. was single and had no children) "proved unpersuasive." Watts does not identify any juror who was single and had no children but was not challenged by the prosecutor. Indeed, Watts acknowledges that the prosecutor did exercise peremptory challenges against two other potential jurors who were single and had no children. Watts contends, however, that the prosecutor might have had other reasons to challenge one of those two potential jurors, including a negative experience he had with law enforcement when he was a teenager. This speculative assertion about another juror provides no basis for concluding that the prosecutor's stated explanation for exercising a peremptory challenge against K.D. was insincere or pretextual.

2. Panelist B.R.

As noted, the prosecutor stated that she challenged B.R. because B.R. (a member of the first group of jurors) had fallen asleep while the court was addressing the second

⁹ The questionnaires for the two unsworn panelists identified by the parties (i.e., the panelists listing their occupation as registered nurse) also reflect that those panelists were married and had children.

group of jurors, and the prosecutor therefore was concerned that B.R. would not remain attentive during trial. Although the trial court had not noticed that B.R. was sleeping, the court expressly found that the prosecutor's account was credible, and that B.R.'s falling asleep was the prosecutor's real reason for challenging her.

In *Snyder v. Louisiana* (2008) 552 U.S. 472 (*Snyder*), the United States Supreme Court explained that, in the context of a *Batson* motion, the trial court plays a critical role in assessing the credibility and demeanor of the prosecutor and, in some cases, the challenged juror. The court stated: "The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, [citation], and 'the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge,' [citation]. In addition, race-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "peculiarly within a trial judge's province," [citations], and we have stated that 'in the absence of exceptional circumstances, we would defer to [the trial court].' [Citation.]" (*Snyder, supra*, 552 U.S. at p. 477.)

In *Lenix*, the California Supreme Court also emphasized the importance of the trial court's role in evaluating credibility and demeanor, while noting that, in some instances, the trial court may not have observed the demeanor or conduct of a juror on which a prosecutor relies in exercising a peremptory challenge. The court explained: "It should be discernable from the record that (1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race neutral; (2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and (3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the

peremptory challenges. As to the second point, the court may not have observed every gesture, expression or interaction relied upon by the prosecutor. The judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred. But the court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist. The record must reflect the trial court's determination on this point [citation], which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (*Lenix, supra*, 44 Cal.4th at pp. 625-626.)

Here, as noted, the trial court considered the prosecutor's reasons for her peremptory challenges and found them to be race neutral; the court also expressly found the prosecutor's explanations were credible and were her real reasons for the challenges. (See *Lenix, supra*, 44 Cal.4th at pp. 625-626.) As to the second point specified in *Lenix*, the trial court did not observe B.R. sleeping. The court explained that it had been focusing on addressing the second group of new jurors, and had not been watching the jurors in the first group. The court, however, expressly found the prosecutor's account to be credible, and accepted the statement that the prosecutor had seen B.R. sleeping.

We conclude that it is appropriate to defer to the trial court's credibility finding, which was based on the court's own observations during voir dire. In addition to the trial court's opportunity to observe and evaluate the prosecutor's demeanor, the court noted that the prosecutor had told the court about the incident in chambers the previous afternoon. Counsel for codefendant Stamps also noted that, on the previous day, the prosecutor had mentioned that B.R. had fallen asleep. The prosecutor's prior reference to the incident suggests that it was not an after-the-fact fabrication to justify a peremptory challenge that actually had been motivated by race. The court also noted that B.R. had "remained on the jury for a fairly long period of time without having been stricken in the first 11 challenges by the People." This factor supports the trial court's finding that the prosecutor did not have a discriminatory reason for challenging B.R. (See *Reynoso, supra*, 31 Cal.4th at p. 926 [prosecutor's decision to pass on, and accept, jury multiple

times with Hispanic juror on panel suggested race-neutral reasons for ultimate challenge of that juror were genuine and not a pretext for discrimination].)

People v. Long (2010) 189 Cal.App.4th 826 (*Long*), on which Watts relies, is distinguishable. In *Long*, the prosecutor exercised peremptory challenges against three Vietnamese jurors, and stated that she had challenged one of them because, during questioning of the entire panel, he did not participate in the discussion. (*Long, supra*, 189 Cal.App.4th at pp. 839-840, 843.) The appellate court held that this assertion was “demonstrably false from the reporter’s transcript.” (*Id.* at p. 843.) The prosecutor’s second reason for striking the juror was that she was uncomfortable with the juror’s “ ‘body language’ ” and “ ‘the way that he was expressing himself,’ ” as well as his failure to make eye contact with the prosecutor. (*Id.* at p. 843.) The prosecutor did not further describe what it was about the juror’s body language or manner of expressing himself that made her uncomfortable. (*Ibid.*) In denying the defendant’s *Batson* motion, the trial court made only a general finding that the prosecutor’s reasons were legitimate. (*Long, supra*, 189 Cal.App.4th at p. 843.) The appellate court held that, in light of the inaccuracy of the prosecutor’s other stated reason for challenging the juror, and the lack of any description in the record (by the trial court or the prosecutor) of what was disturbing about the juror’s body language or his way of expressing himself, the trial court had “erred in accepting the prosecutor’s virtually unverifiable and unverified explanation for challenging” the juror. (*Id.* at p. 848.)

Here, in contrast to *Long*, the prosecutor did not rely on vague assertions about B.R.’s body language or demeanor. (See *Long, supra*, 189 Cal.App.4th at pp. 843, 848.) Instead, the prosecutor described the specific behavior that concerned her, i.e., B.R. “was completely asleep.” Moreover, the trial court, rather than stating only a global conclusion about the legitimacy of the prosecutor’s stated reasons, made an express finding that the prosecutor’s statement on this specific issue was credible. The court also explained its reasons for making that finding, including the prosecutor’s prior report of the incident and the fact that B.R. had remained on the panel for a long period of time. Finally, again

in contrast to *Long*, the prosecutor’s challenge to B.R. did not rest in part on a reason that the record shows to be inaccurate.¹⁰ (See *Long, supra*, 189 Cal.App.4th at pp. 843, 848.)

Watts’s remaining arguments as to B.R. are unpersuasive. Watts asserts that the prosecutor challenged B.R. for “not paying attention at a time when no one expected her to be paying attention.” But the trial court, although advising jurors to bring reading material for breaks and delays, did not tell the jurors not to pay attention during the proceedings. More importantly, the prosecutor did not state that she challenged B.R. for general inattentiveness during jury selection. The prosecutor stated that she challenged B.R. because B.R. had fallen asleep, and that this caused the prosecutor to be concerned that B.R. might not remain attentive and awake during trial. For the reasons discussed above, substantial evidence supports the trial court’s finding that this reason was sincere and race neutral.¹¹

Finally, Watts questions why, if B.R. had fallen asleep, the prosecutor did not challenge B.R. for cause. While the prosecutor may have concluded that her concern about B.R.’s having slept during jury selection would not support a challenge for cause, that concern was still a legitimate and race-neutral basis for a peremptory challenge.

III. DISPOSITION

The judgment is affirmed.

¹⁰ As Watts notes, and as we discuss in part II.C.1 above, the prosecutor did misstate the record in the course of explaining her challenge to K.D. However, for the reasons we discuss above, substantial evidence supports the trial court’s determination that the prosecutor’s challenge to K.D. was not racially motivated. The prosecutor’s misstatement as to K.D. does not persuade us that the trial court should have rejected the prosecutor’s explanation of her challenge to B.R.

¹¹ In response to an argument by counsel for codefendant Stamps, the court stated that, in its view, there was a distinction between a juror reading (and still having “half an ear” on the proceedings) and a juror sleeping (and not hearing anything). Contrary to Watts’s suggestion, we do not read the court’s explanation on this point as an inappropriate effort to provide reasons for the prosecutor’s challenge; instead, the court was explaining why it found the prosecutor’s stated reason (sleeping, not general inattention) was sincere and race neutral.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.